

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
ERNESTINE WELCH,

Plaintiff,

vs.

1:19-CV-846

BIO-REFERENCE LABORATORIES, INC.,

Defendant.  
-----x

Transcript of a Video Status Conference held on  
February 16, 2021, the HONORABLE DANIEL J. STEWART,  
United States Magistrate Judge, Presiding.

A P P E A R A N C E S

(By Video)

For Plaintiff: PATRICK SORSBY, ESQ.  
Attorney at Law  
1568 Central Avenue, 1st Floor  
Albany, New York 12205

For Defendant: FAEGRE, DRINKER, BIDDLE & REATH, LLP  
Attorneys at Law  
600 Campus Drive  
Florham Park, New Jersey 07932  
BY: WILLIAM HORWITZ, ESQ.

Also Present: PLAINTIFF ERNESTINE WELCH

*Jodi L. Hibbard, RPR, CSR, CRR  
Official United States Court Reporter  
100 South Clinton Street  
Syracuse, New York 13261-7367  
(315) 234-8547*

1 (All present by Teams Video, 11:01 a.m.)

2 THE CLERK: We are now on the record, Tuesday,  
3 February 16th, 2021, 11:01 a.m. The case is Ernestine Welch  
4 versus Bio-Reference Laboratories, Inc., Case Number  
5 19-CV-846. Beginning with plaintiff, please state your  
6 appearances for the record.

7 THE PLAINTIFF: My name is Ernestine Welch.

8 THE CLERK: Okay. And Counsel?

9 MR. SORSBY: Attorney Patrick Sorsby.

10 MR. HORWITZ: Good morning, this is William Horwitz  
11 of Faegre, Drinker, Biddle & Reath on behalf of defendant  
12 Bio-Reference Laboratories, Inc.

13 THE COURT: Okay, all right, well, good morning,  
14 everyone, we're here on the record in this Teams call.  
15 Ernestine, are you able to see me at all, are you just  
16 dialing in by phone?

17 THE PLAINTIFF: I'm dialing in by phone, I'm able  
18 to see you, though, you're not able to see me at all.

19 THE COURT: I cannot see you but I can hear you  
20 crystal clear so for what I'm doing, that's good enough.  
21 Just bear in mind that we do have a court reporter who's on  
22 the line so I just tell everybody to make sure that  
23 everyone's finished before they start speaking, that way we  
24 don't have multiple people speaking at once.

25 So for the purposes of this conference this morning

1 is that after this matter was settled, I received a letter  
2 from plaintiff Ernestine Welch with regard to certain  
3 withholdings that were taken out of her check that reduced  
4 the check substantially and she had a concern with regard to  
5 that.

6 In the interim, Judge Sannes, who's the District  
7 Court judge on this matter, approved the settlement and the  
8 matter was resolved, but Judge Sannes has indicated to me  
9 that she wanted me to hold this conference to further clarify  
10 or explain, if necessary, exactly what went on.

11 So Ms. Welch, let me just start with you if I  
12 might. I read your letter that you sent to me and I  
13 appreciate it. I understand obviously you had an expectation  
14 as to what the amount was going to be, it was substantially  
15 less because there were numerous withholdings that were  
16 taken. Is it my understanding, would I be correct that  
17 nevertheless, you did in fact cash the check, is that right?

18 THE PLAINTIFF: Yes.

19 THE COURT: Okay. And I know that your counsel  
20 Mr. Sorsby also received a separate amount for his fees and  
21 that's been cashed as well, and then there was also -- we  
22 went over some issues at the conference that I held, and I  
23 did reach back and ask the court reporter to provide me a  
24 transcript of that proceeding just so I was sure that we  
25 discussed this issue, and so I was provided with a copy of

1     that. And Mr. Horwitz during that conference indicated that  
2     Bio-Reference agrees to pay Ms. Welch the specific amount of  
3     the settlement in a gross amount of \$18,000, it will be less  
4     withholding as W-2 wages, and some portion of that, which  
5     Mr. Sorsby can let me know, will go toward attorney's fees.  
6     So this issue was discussed at the conference. Ms. Welch,  
7     what is it that you wish me to do at this point in time?

8             THE PLAINTIFF: Well, it was -- it was never my  
9     understanding that it would be under severance pay, it was  
10    never written out in the settlement agreement and it wasn't  
11    spelled out in the hearing that I'm aware of that it was  
12    gonna go under severance pay, and severance pay to me is  
13    based on years of service, age, and the title of your job, so  
14    therefore, I don't feel like I received severance pay, and  
15    the tax bracket for this lump sum under severance pay, I was  
16    never given the opportunity on the taxes of whether, how I  
17    wanted that to be split up and wasn't aware of how the  
18    breakdown was for the severance pay.

19            THE COURT: Okay. Have you filed your taxes yet  
20    this year?

21            THE PLAINTIFF: They are in the hands of -- I am in  
22    the process of doing that, yes.

23            THE COURT: Okay. I mean, I don't know whether or  
24    not -- don't get me wrong, I'm not giving tax advice to  
25    anyone here, but you know, as far as if you feel that you're

1 entitled to a refund, you should talk to your accountant or  
2 your tax preparer with regard to that particular issue. But  
3 your claim was always one that I understood and I believe the  
4 way the defendants understood as that of lost wages, that you  
5 were prevented from working at the facility you feel  
6 improperly, so it was a lost wage claim. And in any case  
7 that I'm involved in, that involves lost wages, separate and  
8 apart from say like a physical injury which would not be  
9 taxable, any settlement in that case is going to be taxable.  
10 So your responsibility to pay taxes is specific, it's nothing  
11 I can do anything about and it's nothing the defendants can  
12 do anything about.

13 THE PLAINTIFF: Right, and I totally understand  
14 that, I was aware that I had to pay taxes on it. I just  
15 thought that I was going to get the amount that I was  
16 entitled to and a tax form where I would file my taxes all  
17 together. I wasn't aware of the breakdown that was gonna  
18 happen and that it would be under severance pay because that  
19 was not written out or told to me at any point, in the  
20 settlement agreement or through my attorney. It was just  
21 based on less applicable, I was never told what it was going  
22 to be less applicable for.

23 THE COURT: Mr. Horwitz, just for the record, you  
24 want to just respond?

25 MR. HORWITZ: Um, I mean, your Honor, it was as

1 your Honor indicated, it was mentioned during the settlement  
2 conference that it would be less applicable withholding,  
3 the -- she's already deposited the money or cashed the check.  
4 The settlement agreement indicated twice that the payment was  
5 going to be less applicable withholding, she had 21 days to  
6 review the settlement agreement before signing it, she signed  
7 the agreement, the agreement contained all sorts of  
8 protections to make sure where she confirmed she carefully  
9 read and understood its terms, which would mean that she  
10 understood that it was subject to withholding.

11 It sounds like she's more raising an issue about  
12 how much withholding there was, which I'm also not -- I'm not  
13 a tax lawyer, so I'm not sure how that works, but it's clear  
14 from the pay stub that it was -- the money that was taken out  
15 was taken out for taxes, and as your Honor indicated -- well,  
16 at least my understanding is is that to the extent that she  
17 overpaid on her taxes, she should be getting a refund. And  
18 I'm not sure that would have been any different if -- had she  
19 gotten this payment without taxes and she then had to pay the  
20 taxes separately, I'm not sure the numbers would have come  
21 out any differently, but I do know that the company paid her  
22 the way it was legally obligated to pay her. And she in fact  
23 filled out a W-4 form in connection with the settlement that  
24 said employee's withholding certificate, complete W-4 so that  
25 your employer can withhold the correct federal income tax

1 from your pay.

2 So she clearly knew and, you know, it's unfortunate  
3 that she feels the way that she feels but we did comply with  
4 the agreement as it was worked out in court and amended to  
5 paper.

6 THE PLAINTIFF: Well, I didn't know it was going to  
7 be severance pay, that's my issue, nobody told me it was  
8 going to be filed under severance pay. And as far as  
9 settlement lump sum, there is a tax bracket where it's, you  
10 know, 10,000 -- 10 percent, 20 percent, 30 percent, what  
11 percentage was that taken out? Because that was way over  
12 30 percent.

13 THE COURT: So it's really, Ernestine, just so I'm  
14 clear, it looks to be, so what you're saying is, you know, I  
15 mean obviously you're not happy but you understand that taxes  
16 are inevitably your responsibility, you --

17 THE PLAINTIFF: Yes.

18 THE COURT: You just think it was taken out  
19 obviously --

20 THE PLAINTIFF: Severance pay, under severance pay.

21 THE COURT: I'm sorry, I didn't mean to cut you  
22 off. So you're saying because it was referenced as severance  
23 pay, whatever that might mean, it was at a higher withholding  
24 rate than if it were just wages, is that correct?

25 THE PLAINTIFF: Right.

1 THE COURT: And have you -- so really that becomes  
2 an issue of you filing, requesting a refund from the federal  
3 government, I mean they're the ones that have your money at  
4 this point in time.

5 THE PLAINTIFF: Well, my thing is if it wasn't  
6 written in the contract that it was severance pay, I mean I  
7 was never aware that it was gonna be under severance pay and  
8 if it was under severance pay then I was supposed to be  
9 contacted of how I would like those taxes to be taken out.  
10 And I should have had a right to be, you know, for the taxes  
11 to go over in my retirement plan or something like that, that  
12 I wouldn't get taxed so hard. I was not aware of that.  
13 Mr. Sorsby sent me the W-2 forms and told me to fill out  
14 those forms -- or W-4, which one it is, in regards to filling  
15 those forms out and getting them back to me as soon as  
16 possible, that payroll needed these forms to cut the checks.  
17 So I thought if I didn't fill out the form, the checks  
18 wouldn't get cut. I wasn't aware of the tax liability that I  
19 was gonna be against at this point.

20 THE COURT: Well, what was your anticipation as to  
21 the amount of money that would be withheld?

22 THE PLAINTIFF: 2800, 20 percent.

23 THE COURT: Okay. All right. Well, it -- I will  
24 consider this issue further but it seems to me that the fact  
25 of the withholding was explained at the settlement



1 conference.

2 THE PLAINTIFF: As less applicable, it wasn't  
3 explained as severance pay, it wasn't explained what they was  
4 going to file it under.

5 THE COURT: No, I understand what you're saying as  
6 far as the withholding, just saying the issue of the  
7 withholding and that these were wages was explained at the  
8 conference and it was also included in the settlement  
9 agreement. The settlement agreement was signed, the checks  
10 have been cashed, insofar as there was a withholding that was  
11 more than should have been withheld, the remedy in that case  
12 would be to file for a refund.

13 Mr. Sorsby, do you have anything you want to add at  
14 this point in time?

15 MR. SORSBY: I think that Ms. Welch has already  
16 indicated she understands that taxes are to be paid and she's  
17 liable for that and she seems to indicate she understands  
18 that taxes would be withheld. I think her issue is that, and  
19 I'm not an accountant just like everybody else here, I think  
20 she's concerned, and I don't want to speak for her, she can  
21 elaborate, that the way the stub reads as a severance, it  
22 says severance instead of a settlement, I think maybe perhaps  
23 her concern is that, does that change the ultimate tax  
24 liability in a negative way because of the way it's  
25 characterized.

1 I will say in reading the case law in the tax  
2 court, in regards to settlements involving discrimination  
3 cases like this, the tax court is not very generous in  
4 recharacterizing how settlements are considered. They will  
5 consider a good portion of the settlement as wages, and if a  
6 settlement tries to get cute and characterizes it as  
7 something other than wages, at least the majority of it, they  
8 will recharacterize it and the plaintiff will face severe  
9 consequences. So I don't know if characterizing the check  
10 that she received as a severance has a negative tax  
11 implication, but she is correct in that it did not say that  
12 in the settlement agreement. But it might mean nothing. I  
13 don't know if just putting that on a pay stub has any  
14 significance. I don't know. I'm not an accountant, so  
15 that's my -- that's the only concern that I can see that  
16 Ms. Welch is presenting here today.

17 THE COURT: Okay. And Ms. Welch, you haven't heard  
18 back from your tax advisor, your accountant, with regard to  
19 if you're entitled to a refund because of the withholdings,  
20 correct?

21 THE PLAINTIFF: Correct.

22 THE COURT: So it may be a nonissue. But it seems  
23 to me, and my understanding and my determination would be  
24 that there was an agreement in place to appropriately settle  
25 the case, and you know, insofar as there has allegedly been a

1 breach of the agreement, that's a separate matter, it's not  
2 necessarily before the court, but I will review  
3 Ms. Ernestine's argument here and make a recommendation to  
4 Judge Sannes since she's the District Court judge and the one  
5 who's in fact closed out the case.

6 Ms. Welch, is there anything further you want to  
7 tell me about while we're all together on this conference?

8 THE PLAINTIFF: No, Mr. Sorsby's spelled it out  
9 exactly my thoughts of the case. It wasn't, I wasn't aware  
10 of it was going to be settled under severance pay and that I  
11 was gonna be hit with that liability, the tax liability that  
12 I was, and I think that if it was under wages or something  
13 else, maybe I wouldn't have that huge tax liability. That  
14 was not spelled out to me and that's my argument.

15 THE COURT: Okay. All right. All right,  
16 Mr. Horwitz, anything further before we end?

17 MR. HORWITZ: Just very quickly, your Honor. And  
18 so I understand that Ms. Welch is referring to the word on  
19 the earning statement she got with her settlement payment, it  
20 says severance. That was, for whatever reason some person  
21 internally at the company indicated severance, but I'm not  
22 aware of any reason why that would -- why the tax liability  
23 would be different. That being said, to the extent she  
24 explains to her tax advisor that this was wages, this should  
25 be taxed at the rate of wages, I don't think there's going to

1 be -- there shouldn't be any problem. Certainly if we  
2 were -- if the company or I were ever contacted, we would of  
3 course take the position that this was exactly what everybody  
4 seems to agree that it was, which was wages.

5 THE COURT: Okay.

6 THE PLAINTIFF: Well, because it was -- I'm sorry,  
7 because it was under severance pay and it was the end of the  
8 year, it was considered my yearly income, and that's why  
9 there was a large tax liability on it.

10 THE COURT: Okay. All right. Well, let me  
11 consider this further, I'll issue either a written order or a  
12 text order with regard to that but I appreciate everyone  
13 coming on and explaining to me this more fully, all right?

14 THE PLAINTIFF: Okay, thank you.

15 THE COURT: Thank you.

16 MR. HORWITZ: Thank you, your Honor.

17 MR. SORSBY: Thank you, your Honor.

18 (Proceedings Adjourned, 11:17 a.m.)  
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1  
2 CERTIFICATE OF OFFICIAL REPORTER  
3  
4

5 I, JODI L. HIBBARD, RPR, CRR, CSR, Federal  
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7 United States District Court for the Northern  
8 District of New York, DO HEREBY CERTIFY that  
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17 Dated this 10th day of March, 2021.  
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20 /S/ JODI L. HIBBARD

21 JODI L. HIBBARD, RPR, CRR, CSR  
22 Official U.S. Court Reporter  
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